Supreme Court, U.S.
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No. 93-1529

In The

Supreme Court of the United States

October Term, 1993

FRANCIS PICRAY, JR.,

Petitioner,

v.

CITY OF DES MOINES, IOWA, REGINALD V. SIPFLE, HAROLD E. SMITH, JERRY THOMPSON, NELDA MICKLE, PAT KOZITZA, RICHARD WILKEY, EDDIE L. CARR AND WILLIAM McLAUGHLIN, Individually and as Agents for the City of Des Moines, Iowa,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Iowa

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. WHETHER THIS COURT SHOULD GRANT CERTIORARI TO REVIEW THE IOWA SUPREME COURT'S ORDER DENYING FURTHER REVIEW WHEN THE IOWA COURT OF APPEALS DECISION DID NOT CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT, DID NOT DECIDE A QUESTION OF FEDERAL LAW IN A WAY THAT CONFLICTS WITH OTHER DECISIONS, AND DID NOT DECIDE ANY IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN DECIDED BY THIS COURT?

II. WHETHER THIS COURT SHOULD GRANT CERTIORARI TO REVIEW THE IOWA SUPREME COURT'S ORDER DENYING FURTHER REVIEW WHEN THE PETITION CONTAINS MISSTATEMENTS OF FACTS AND INCORRECT ASSERTIONS OF LAW, THE PETITION MEETS NONE OF THE CRITERIA FOR REVIEW BY THIS COURT AND THIS ORDER AND THE IOWA COURT OF APPEALS RULING ARE UNREPORTED AND OF NO PRECEDENTIAL VALUE?

PARTIES TO THE PROCEEDINGS

Francis Picray, Jr. was not and is not eligible for employment with the City of Des Moines.

City of Des Moines, Iowa is a municipal corporation that may have advertised a plumber position in 1989 for which Picray was not eligible.

Reginald V. Sipfle was and is Clerk to the Des Moines Civil Service Commission.

Harold E. Smith was and is the City Engineer for the City of Des Moines.

Jerry Thompson was Personnel Director for the City of Des Moines.

Nelda Mickle was and is a City Solicitor for the City of Des Moines Legal Department, and acted as legal adviser to the Civil Service Commission.

William McLaughlin has been Building Services Superintendent in the Engineering Department of the City of Des Moines since May of 1982.

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Respondents CITY OF DES MOINES, IOWA, REGINALD V. SIPFLE, HAROLD E. SMITH, JERRY THOMPSON, NELDA MICKLE, PAT KOZITZA, RICHARD WILKEY, EDDIE L. CARR AND WILLIAM McLAUGHLIN respectfully oppose the Petition for Writ of Certiorari to review the order denying further review entered by the Iowa Supreme Court in the above-captioned case on December 3, 1993.

OPINIONS BELOW

The Iowa Supreme Court's order denying further review of the Iowa Court of Appeals' ruling, which the Petitioner seeks to review, is unreported and is included in Petitioner's Appendix. The Iowa Court of Appeals' decision affirming summary judgment in favor of the Defendants, dated October 5, 1993, is unreported and is included in the Petitioner's Appendix. The Polk County District Court ruling granting summary judgment to the Defendants as to the Plaintiff's federal law claims dated April 14, 1992 is unreported and is included in the Petitioner's Appendix. The Polk County District Court ruling granting summary judgment as to the Plaintiff's remaining state law claim dated September 25, 1992 is unreported and is included in the Petitioner's Appendix.

JURISDICTION

Jurisdiction in the state trial court below, a court of general jurisdiction, was based on Iowa Code Section 602.6101. The trial court exercised its concurrent jurisdiction over the Plaintiff's federal claims. Jurisdiction in the Iowa Court of Appeals and the Iowa Supreme Court was based on Iowa Code Section 602.4102. The Petition for Writ of Certiorari was filed in this Court on or about March 23, 1994. The Petition apparently seeks review, under U.S. Supreme Court Rule 10(c) and 28 U.S.C. § 1257, of the Iowa Supreme Court's order denying further review.

PROVISIONS OF STATUTES AND RULES INVOLVED

Iowa Code (1989) Section 729.4(1), which provides as follows:

> 1. Every person in this state is entitled to the opportunity for employment on equal terms with every other person. A person or employer shall not discriminate in the employment of individuals because of race, religion, color, sex, national origin, or ancestry. However, as to employment an individual must be qualified to perform the services or work required.

Iowa Code (1989) Section 400.4, which provides in pertinent parts:

> the [Civil Service] commission shall appoint an employee . . . to be clerk of the commission
>
> The civil service commission shall keep . . . a complete individual service record of each civil service employee which record shall be permanent and kept up to date.

Iowa Code (1989) Section 400.8, which provides in pertinent part:

> 1. The [Civil Service] commission shall . . . hold examinations for the purpose of determining the qualifications of applicants for positions under civil service . . . which examinations . . . shall . . . fairly test the mental and physical ability of the applicant to discharge the duties of the position to which the applicant seeks appointment.

Iowa Code (1989) Section 400.11, which provides in pertinent part:

> The [Civil Service] commission shall . . . certify to the city council a list of . . . persons who qualify . . . for the position they seek to fill . . . and all . . . vacancies in positions under civil service . . . shall be filled from said lists . . .

Rules and Regulations Des Moines Civil Service Commission, Chapter IV, Section 6., which provides in part:

> The Commission shall reject an application if the applicant does not possess the minimum qualifications.

Rules and Regulations Des Moines Civil Service Commission, Chapter IX, Section 1., which provides in pertinent part:

> Disciplinary Procedure: The City Manager- . . . may peremptorily suspend, demote or discharge a subordinate then under the person's direction for neglect of duty, disobedience of orders, misconduct, or failure to properly perform the subordinate's duties.

STATEMENT OF THE CASE

1. Facts Pertinent to the Petition.

The Plaintiff's Petition omits relevant facts, includes irrelevant statements, and asserts as fact certain matters which are not true and for which there is no evidential support in the record. These are the undisputed facts which are pertinent to the questions presented in the Petition:

1. The Plaintiff was employed by the City of Des Moines, Iowa from September 25, 1979 to June 28, 1982, as a Senior Building Equipment Operator. This was a Civil Service position. He was terminated from his employment with the City for several reasons, including incompetency, inefficiency and negligence in the performance of his duties, insubordination, falsification of employment applications, and notoriously disgraceful conduct. These reasons are listed in a memo which was attached to the City's Personnel Action Form, which also stated that he was "not recommended" for rehire, in other words, ineligible to be rehired.

2. The Plaintiff filed suit following his termination. This matter was settled in 1986. A release executed in conjunction with this settlement refers to a release of all claims relating to the termination of his employment with the City in 1982 and includes a denial of liability of the Defendants.

3. In 1989, the Plaintiff sought application for another Civil Service position with the City, this time as a plumber. His application was not processed as he was not eligible for rehire by the City under the circumstances of his previous termination.

4. The Plaintiff filed this action pro se, generally complaining that various current or former City employees violated his civil rights under 42 U.S.C. §§ 1983, 1985, 1986 and the Fair Labor Standards Act when he was not hired by the City in 1989. The Plaintiff attached the Personnel Action Form and memo mentioned above to his petition at law.

5. The Defendants initially sought summary judgment based, in part, on the Plaintiff's failure to specifically allege any deprivation of his rights under federal law. The Plaintiff, represented by counsel at this point of the proceedings, agreed that he failed to state a claim under federal law. The trial court granted summary judgment as to the federal claims.

6. The Defendants then sought summary judgment as to the Plaintiff's purported state law claim of "failure to hire" based on his failure to state a claim upon which relief can be granted. The trial court granted this motion for summary judgment, dismissing the Plaintiff's petition in its entirety.

7. The Plaintiff appealed as of right to the Iowa Supreme Court. The case was assigned to the court of appeals. The Iowa Court of Appeals affirmed the trial court's rulings. The Plaintiff applied for further discretionary review by the Iowa Supreme Court. This request was denied on December 3, 1993.

8. The Plaintiff filed a Petition for Writ of Certiorari with this Court on or about March 3, 1994. This Petition was returned by the clerk for failure to follow the proper form. A corrected Petition was filed on or about March 23, 1994.

2. Inaccurate Statements in the Petition

The Plaintiff's Questions Presented, List of Parties, summaries of Statutory Provisions, Statement of the Case and Reasons Supporting Issuance of the Writ contain

inaccurate statements of fact and law and are misleading in several particulars.

The Plaintiff's List of Parties states that he, Francis Picray, is an eligible individual. He was and is ineligible for employment with the City of Des Moines. The List aiso states that William McLaughlin was hired to discharge Picray. That statement is unsupported by any reliable evidence.

The Plaintiff's summary of Statutory Provisions contain misstatements of Iowa law regarding equal opportunity for employment and civil service requirements. Iowa Code Section 729.4(1) pertains to persons who are qualified for a particular position. The statutes and rules pertaining to civil service applications allow the commission, through its clerk, to reject an application.

The Plaintiff's Statement of the Case refers in part to factual matters that are not supported by the record and appear to be misleading in several particulars. For example, at p. 5 he states that the memo or letter attached to the Personnel Action Form contained untrue and unfounded allegations. This statement is apparently his personal opinion, is not supported by any evidence in the record, and was the subject matter of previous litigation. At p. 7 he refers to public criticism as the reason for his termination. These statements are not supported by any evidence in the record. He also states that damage for defamation was included in the settlement of the first litigation. The release form that he refers to does not include any admission of liability or specify payment for defamation.

REASONS FOR DENYING THE PETITION

The issues raised in the Petition do not raise any important question of denial of federal due process that justifies consideration by this Court. In fact, as the record reveals, the Plaintiff has made use of all avenues available for the process of litigation to pursue his complaints. He appealed the Civil Service Commission decision ratifying his termination in 1982. He also filed a lawsuit in state court at about that time generally complaining of the same issues. That litigation reached a full and final disposition by settlement in 1986.

Following his apparent dissatisfaction with the processing of his job application in 1989, he filed suit in 1991. He continues to raise some of the same issues that were settled in the earlier litigation. The new issues raised in this lawsuit received a full hearing at the time of the motions for summary judgment and were ruled upon by the trial court. The Plaintiff had the opportunity to further process of law on appeal to present his arguments. The mere fact that the Plaintiff was unsuccessful on his claims certainly cannot mean that he was denied due process under the Constitution as interpreted by this Court.

Similarly, the issues raised in the Petition do not raise any important question of federal equal protection that deserves consideration by this Court. The Plaintiff, a white male, is not a member of any protected class. The reasons his application was not processed in 1989 were entirely personal to him, relating to his behavior during his previous employment as specified in the memo attached to the Personnel Action form. As this Court held

more than fifty years ago, employers are generally free to select employees at will. *NLRB v. Jones and S. Laughlin Corp.*, 301 U.S. 1, 45 (1937). This general principle still holds true. *Rayburn v. Equitable Life Assurance Society*, 805 F.Supp. 1401, 1403 (S.D. Texas 1992); *Smith v. American Greetings Corp.*, 804 S.W. 2d 683, 684 (Ark. 1991); *U.S. Steel Corp. v. Nichols*, 229 F.2d 396, 399 (6th Cir. 1956).

In addition, under Iowa law, an appellant cannot raise a new theory of recovery for the first time on appeal. *Cole v. First State Bank of Greene*, 463 N.W. 2d 59, 63 (Iowa 1990). The Plaintiff raised the equal protection argument for the first time on appeal to the Iowa Court of Appeals. He is raising the federal due process claim for the first time in this Petition. He cannot continue to attempt to raise new theories for recovery on each successive appeal. Under the actual facts of this case, the Plaintiff simply fails to state a claim upon which relief can be granted under any theory.